No. 15550

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ANTHONY A. ALESI,

*Appellant,*

*vs.*

GORDON L. CORNELL, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California,

*Appellee.*

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## APPELLEE'S BRIEF.

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## APPELLEE'S BRIEF.

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### Statement of Jurisdiction.

On January 4, 1956, appellant filed in the United States District Court for the Southern District of California a Complaint for Injunction and Declaratory Judgment. [Tr. of R. 2.]* On February 17, 1956, an Answer to the Complaint was filed by appellee. [Tr. of R. 8.]

On December 3, 1956, the case was tried before the Honorable William M. Byrne, and on December 17,

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*Tr. of R. refers to the Clerk's Transcript of Record; R. T. refers to the Reporter's Transcript of Proceedings.

1956, the relief prayed for in the Complaint was denied and judgment rendered in favor of the appellee. [Tr. of R. 34-38.] A timely notice of appeal was filed on February 13, 1957. [Tr. of R. 39.]

The District Court had jurisdiction pursuant to the provisions of Title 8, United States Code, §§1251(a)(4), 1329, and Title 5, United States Code, §1009.

This Court has jurisdiction of the appeal pursuant to the provisions of Title 28, United States Code, §1291, and Rules 73 and 75 of the Federal Rules of Civil Procedure, Title 28, United States Code Annotated.

## Statement of the Case.

Appellant is a citizen of Italy, by reason of his birth at Ciminin, Palermo, Italy, on June 21, 1912, [Tr. of R. 27.] He was admitted for permanent residence to this country on July 24, 1913, through the Port of New York. (*Ibid.*)

On February 14, 1955, a warrant of arrest in deportation proceedings was issued by the Immigration and Naturalization Service at Los Angeles, California, charging that appellant was subject to deportation under Title 8 U. S. C. §1251(a)(4), in that he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal conduct. [Tr. of R. 30.] The aforesaid warrant was served upon appellant on February 24, 1955. (*Ibid.*)

A deportation hearing was held March 10, 1955 at which time appellant was present and represented by

Lloyd A. Tasoff, an attorney at law admitted to practice before the Immigration and Naturalization Service. (*Ibid.*) At the hearing appellant admitted convictions for five criminal offenses since 1940. [Ex. A, Hearing of March 10, 1955.] The proceeding was adjourned at the request of said counsel, in order that the Government's evidence might be met. (*Ibid.*) [Tr. of R. 30.] At the time, appellant stated that he understood the case was adjourned to a future date, and that he would be notified by mail of the resumed date. [Ex. A, Hearing of March 10, 1955.] Appellant provided the Immigration and Naturalization Service with his then present address. (*Ibid.*)

On May 2, 1955, the Immigration and Naturalization Service wrote letters to appellant and his counsel, advising them that the hearing would be resumed on May 23, 1955. [Tr. of R. 30.] On May 16, 1955, appellant's counsel wrote the Immigration and Naturalization Service, sending a copy of his letter to appellant, advising that he had withdrawn as appellant's counsel, and that he had informed appellant several times to obtain other counsel, if that was his desire. (*Ibid.*) [Ex. A, Hearing of March 10, 1955, Ex. 12.] At the time of trial, appellant testified that Mr. Tasoff had informed him that he had withdrawn as counsel. [R. T. 7.] He further testified he had "no recollection" of having received the notice of May 2, 1955. (*Ibid.*)

Neither appellant nor anyone on his behalf appeared before the Immigration and Naturalization Service on

May 23, 1955. [Tr. of R. 31.] There is no record of any proceedings having taken place on that date. [Ex. A.]

Appellant was arrested in Nevada on June 6, 1955, and was returned to face criminal prosecution by local authorities in Los Angeles. [R. T. 8; Tr. of R. 29.] He was notified while in jail that another hearing in his immigration case would occur July 1, 1955. [R. T. 9.] On July 1, 1955, neither appellant nor anyone on his behalf appeared before the Immigration and Naturalization Service, and the Special Inquiry Officer on that date ordered appellant deported, after first finding that he had been given reasonable opportunity to appear on May 23, 1955. [Tr. of R. 31; Ex. A, Decision of July 1, 1955.]

On July 13, 1955, appellant appealed to the Board of Immigration Appeals. [Tr. of R. 31.] A brief was filed on behalf of appellant. Oral argument was had on August 17, 1955 and on October 10, 1955, the Board affirmed the decision below by dismissing the appeal. (*Ibid.*) The points raised on appeal to this Court were not presented to the Board in the administrative appeal. [Ex. A.]

## ARGUMENT.

### I.

### Hearing of May 23, 1955.

Two of the questions raised on appeal involve the "deportation hearing of May 23, 1955." It is argued that there is uncertainty in the record as to whether appellant received actual notice of the hearing, apparently because appellant testified at the trial below that he had "no recollection" of receiving the notices which the Immigration and Naturalization Service mailed to him and to his attorney on May 2, 1955. It is also argued that these notices were not reasonable, within the meaning of 8 U. S. C. 1252(b), which provides that a determination of deportability shall be made only when an alien has had a reasonable opportunity to be present.

One could find that appellant was given such a "reasonable opportunity to be present" from the facts that a notice was mailed to his last known address, and was not returned, and that a copy of such notice also was sent to appellant's counsel. It could also be inferred that appellant's absence from the May 23, 1955 proceeding was due to his own wishes, as he was returned to Los Angeles involuntarily, only after his arrest in Nevada. However, even if it be assumed that there was insufficient notice, there is no showing made that any prejudice resulted from the alleged error.

First, appellant's absence from the May 23, 1955 proceeding was not prejudicial because of anything which the Immigration and Naturalization Service did in his

A. Appellant has not offered any excuse for his late retention of counsel, even though he was aware as of February 24, 1955 of the March 10, 1955 hearing. [Tr. of R. 30.] Any unpreparedness of his attorney cannot be laid at the door of the Immigration and Naturalization Service.

B. His attorney had had sufficient time to familiarize himself with the case so as to be able to have present and examine a witness for appellant, *i. e.,* his wife. [Ex. A, Hearing of March 10, 1955.] Furthermore, the case was not so complex as to require very much preparation. In essence, the Government's evidence consisted of documents showing the convictions of appellant. Although his counsel wanted an opportunity to consult with appellant concerning these convictions, before proceeding with the case, appellant admitted the truth of the convictions. Thus, there would not appear to be prejudice from the presentation of the Government's case. Appellant was represented by the counsel of his choice and they had the opportunity to examine the evidence introduced.

*Cf.*:

*Low Wah Suey v. Backus*, 225 U. S. 460, 470;

*Landon v. Clarke*, 239 F. 2d 631, 636 (C. A. 1, 1957);

*United States v. Neelly*, 202 F. 2d 221, 223 (C. A. 7, 1953);

*Ex parte Marino*, 50 F. 2d 582, 586 (9 Cir., 1931);

*Seif v. Nagle*, 14 F. 2d 416 (9 Cir., 1926);

*Sinicalchi v. Thomas*, 195 F. 701, 705 (6 Cir., 1912).

C. The adjournment of the hearing at the request of appellant's attorney [Tr. of R. 30], would seem to remove any prejudice from the alleged error. The continuance afforded appellant an opportunity to consult with his attorney and prepare any defense desired, or to point out deficiencies in the evidence previously presented.

D. Since appellant did not raise on his administrative appeal the question of deprivation of counsel, apparently he did not feel that he had been sorely aggrieved thereby. In any event, it is elementary that he should have exhausted his administrative remedies.

> *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36, 337 (1953);
>
> *Bustos-Ovalle v. Landon*, 225 F. 2d 878 (C. A. 9, 1955);
>
> *United States v. Neelly*, 202 F. 2d 221, 224 (C. A. 7, 1953).

E. Finally, appellant admitted the truth of the Government's evidence at the hearing of March 10, 1955. [Ex. A, Hearing of March 10, 1955.] That evidence was stipulated to in the pretrial order [Tr. of R. 27-29], and is not disputed herein. (App. Br. p. 3.) It would seem hard, therefore, to find prejudice resulting from the alleged error. This point was well-stated in *Madokoro v. Del Guercio*, 160 F. 2d 164, 167 (9 Cir., 1947):

> "We think it unnecessary to determine whether there was here a denial of due process, for all the facts elicited from the appellant at the Fort Lincoln hearing relevant to the deportation of such an alien

> are admitted to be true. Failure to have counsel, if error, like other errors, may not be prejudicial. If there be a presumption that the denial of due process is presumed prejudicial, that presumption is overcome by appellant's admissions here. *Cf.* Davis v. Texas, 139 U. S. 651."

Appellant contends he next was deprived of counsel when a hearing took place in his absence after Mr. Tasoff had withdrawn from the case, and "a fortiori, he did not have the opportunity to seek other counsel." If appellant refers to the hearing of May 23, 1955 as being the one which took place in his absence, the error indeed would be harmless as nothing occurred on that date. In any event, appellant would appear to have had ample opportunity to consult with and obtain counsel even prior to May 23, 1955.

First, the decision of July 1, 1955 had appended to it Exhibit 12, a letter written May 13, 1955 by Mr. Tasoff, which notes that a copy was sent to appellant. The letter states in part:

> "You are hereby advised that I am withdrawing as the attorney for Mr. Alesi . . . and I have informed him several times in the past to secure other counsel if that is his desire."

Moreover, appellant admitted at the trial that Mr. Tasoff had told him that he was no longer his attorney, and apparently was so told before May 23, 1955. [R. T. 7.] Thus the lack of counsel at the May 23, 1955 "hearing", apparently was the fault only of the appellant.

If appellant refers to the decision of July 1, 1955 as being the hearing which took place in his absence when

he was unable to secure counsel, even more revealing facts are present. Appellant testified at the trial that he had notice of the July 1, 1955 proceeding [R. T. 9], but has never offered any reason why he did not obtain or could not have obtained counsel to represent him then. Therefore, there does not appear to be the slightest basis for the allegation that appellant was deprived of counsel.

## III.

## Substantiality of Evidence.

No contention is made that the evidence introduced at the March 10, 1955 hearing is, *per se*, insufficient. Instead, it is contended that the hearing was unfair, and that this being so, any evidence admitted therein was done so improperly, and thus there was no evidence at all. Inasmuch as appellee's arguments concerning the fairness of the hearing have already been set forth, they will not herein be repeated.

## Conclusion.

No error appears in the administrative proceedings below. The alien was given a reasonable opportunity to appear at all stages of the proceedings, together with counsel of his choice. In any event, it has not even been argued by appellant that any prejudice resulted from the alleged errors. It is well-established that procedural errors in administrative proceedings which do not result in prejudice are to be disregarded.

*Bilokumsky v. Tod*, 263 U. S. 149, 157 (1922);

*Couto v. Shaughnessy*, 218 F. 2d 758 (C. A. 2, 1955);

*Bufalino v. Irvine*, 103 F. 2d 830 (10 Cir., 1939);

*Singh v. Carr,* 88 F. 2d 672, 678 (9 Cir., 1937);

*Reynolds v. United States,* 68 F. 2d 346 (7 Cir., 1934).

Consequently, the judgment of the District Court should be affirmed.

Respectfully submitted,

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